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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re L.B. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.A.,

Defendant and Appellant.

D075463

(Super. Ct. No. J516969CD)

APPEAL from orders of the Superior Court of San Diego County, Edlene
McKenzie, Judge. Affirmed.

Jacques Alexander Love, under appointment by the Court of Appeal, for
Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County
Counsel, and Kristen M. Ojeil, Deputy County Counsel, for Plaintiff and Respondent.

A.A. (Mother) appeals orders under Welfare and Institutions Code section 366.26¹ selecting adoption as the permanent plan for her daughter L.B. and son B.B. (the children) and terminating parental rights. Mother contends the court erred in finding there was not a beneficial parent-child relationship between her and the children within the meaning of section 366.26, subdivision (c)(1)(B)(i) that precluded the termination of her parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2017, the San Diego County Health and Human Services Agency (the Agency) filed petitions under section 300 on behalf of one-year-old L.B. and 11-day-old B.B. B.B.'s petition alleged, under section 300, subdivision (b), that he tested positive at birth for amphetamine and methamphetamine and was in intensive care due to respiratory and feeding issues. Mother also tested positive for amphetamine and methamphetamine at B.B.'s birth, but she denied using those drugs. Mother had also tested positive for methamphetamine when she was pregnant with L.B. in April 2016.

In another count under section 300, subdivision (j), B.B.'s petition alleged he was at risk of physical harm due to his half-brother J.C.'s "being subjected to physical harm [in January 2008] when he suffered rib fractures and a subdural hematoma suspicious for non-accidental trauma as the mother and [J.C.'s] father could not provide an explanation for the injuries." The petition further alleged that Mother failed to reunify with J.C., who

¹ All further statutory references are to the Welfare and Institutions Code.

suffered serious physical harm or neglect, and that Mother's failure to address the issues leading to J.C.'s injuries placed B.B. at a substantial risk of physical harm.

L.B.'s petition contained the same allegations under section 300, subdivision (j), regarding J.C.'s abuse. In December 2017, the Agency added a second count under section 300, subdivision (j), alleging that L.B.'s sibling B.B. had tested positive at birth for amphetamine and methamphetamine, that Mother had also tested positive for those drugs but denied using them, and that Mother had tested positive for methamphetamine when she was pregnant with L.B. in April 2016. L.B.'s petition further alleged that "the mother and the father tested positive on [September 27, 2017] and continue to deny substance abuse."

The Agency's detention report noted that in July 2017, a little over two weeks before B.B.'s birth, the Agency received a report that Mother, the children's father,² and L.B. were homeless and living in a tent on an unsanitary campsite. There was rotten food and garbage in the vicinity and a bucket of urine near the tent. L.B. appeared to be dirty, but not malnourished. The day after B.B. was born, the Agency received a report that he had been born in the parents' tent and then taken to the hospital, where he and Mother tested positive for amphetamine and methamphetamine. Mother indicated that she was willing to care for B.B., but had not shown any interest in him after she was discharged from the hospital.

² The children's father is not a party to this appeal.

Mother had prior Child Welfare Services (CWS) cases for her two older sons, nine-year old J.C. and eight-year-old D.C., who were removed from her care due to her drug use and homelessness. J.C. was under a permanent plan of guardianship with the maternal grandparents and D.C. was also in the care of the maternal grandparents, although Mother had reunified with him. An Agency social worker asked the maternal grandfather if he was willing to care for L.B. and B.B. The maternal grandfather declined, explaining that he and his wife were already caring for Mother's two oldest children and he just had surgery on his foot.

At the time detention hearing, the Agency had not located the parents and L.B. The court found that reasonable search efforts had been made to locate the parents and notify them of the dependency proceedings and ordered that those efforts continue. The court found prima facie showings had been made on the petitions and ordered the children detained. B.B. was still in the hospital and the court issued an order to pick up and detain L.B. The court granted Mother supervised visitation but declined to order visitation for the father until he appeared in court.

The Agency's report for the jurisdiction/disposition hearing filed on September 17, 2017 noted the children were detained in a licensed foster home. The foster mother reported that the parents had not requested a visit with the children since the children had been in her home. Mother first called the foster mother on September 10, 2017.

A social worker met with the parents on September 11, 2017. The father told the social worker that Mother had never used drugs around him and that he was shocked when he heard Mother and B.B. had tested positive for amphetamine and

methamphetamine. He said his drug of choice was methamphetamine, but he was not using drugs other than medical marijuana occasionally. He had been clean from all other drugs for over 11 years. He denied that he, Mother, and L.B. had been living in unsanitary conditions and that there had been a bucket of urine near their tent. He was not employed full time but occasionally worked side jobs, including auto repair and construction.

Mother denied using drugs and suggested she had tested positive for amphetamine and methamphetamine because she had taken Sudafed and Naproxen for a cold. She said she had never used methamphetamine but "used to be around it." Her drugs of choice had always been marijuana and alcohol. She wondered if the marijuana she had smoked was laced with methamphetamine. She told the social worker that she and the father had just bought a larger tent that would fit the whole family. She denied that there had been a bucket of urine near their tent. She was not working because she was under a lot of stress caused by being homeless and having children. The family's only income was welfare, food stamps, and the father's side jobs. The social worker asked Mother about visitation, and Mother said she did not know she was allowed to visit the children. The social worker encouraged her to call the foster mother as soon as possible to set up a visit.

The Agency's assessment was that L.B. and B. B. needed the court's protection because the parents were unable to safely care for them. Mother had no explanation of why she and B.B. tested positive for methamphetamine and both parents denied using methamphetamine. The parents did not have a stable home for the children and had very minimal baby supplies for B.B. The Agency recommended the children be declared

dependents of the court and the parents be provided reunification services and supervised visitation.

At a hearing on September 19, 2017, the parents made their first appearance in the proceedings and the court set a contested jurisdiction/disposition hearing for October 26, 2017. The court ordered liberal supervised visitation for the parents and ordered the Agency to provide them voluntary services.

In an addendum report filed on October 12, 2017, the social worker reported that on September 16, the foster mother received a text message from Mother requesting a visit with the children. The foster mother texted Mother back the same day and asked her if Tuesdays and Thursdays from 4:00 to 5:00 p.m. would work for visits. As of September 18, Mother had not responded to the foster mother.

On September 19, 2017, the social worker met with the parents outside of the court. The social worker asked Mother why she had not visited the children. Mother said the location was far and she did not have transportation. The social worker told the parents that there were bus tokens for them in the Agency office and that the visitation location was not far from the court. The social worker encouraged them to set up a visit and they said they would. The social also asked the parents to drug test that day, noting Mother was not working or attending drug treatment.

On September 28, 2017, the foster mother told the social worker she had just spoken with Mother and scheduled visitation between the children and the parents every Monday and Thursday from 4:00 to 5:00 p.m., beginning on October 2. On October 3,

the foster mother reported that the parents attended their first visit with the children the day before and it went well.

On October 5, 2017, the social worker met with the parents after their visit with the children and informed them she had received their drug test results and they both tested positive with high levels for methamphetamine. The parents appeared surprised and said they had no idea why their tests would be positive. The father suggested the results might be from a 2016 drug test. The social worker suggested the father meet with a substance abuse specialist and encouraged Mother to start drug treatment at "ParentCare" or meet with a substance abuse specialist. The social worker informed the parents that due to the young ages of the children, the parents had only six months to make significant progress on their case plans.

The Agency filed an addendum report on November 29, 2017 that addressed the parents' progress with reunification services. The parents informed the social worker on October 19 that they had not started drug treatment yet. The parents cancelled a visit with the children scheduled for that day, but otherwise had been consistently visiting the children. On October 23, Mother went to the CWS office to request bus passes. The social worker asked her about drug treatment and she said that she and the father had not yet decided what treatment program they wanted to attend.

Mother came to the CWS office again on November 2, 2017 to request a bus pass. She reported that she would be unable to attend a visit with the children that day because she was busy trying to protect her belongings, a lot of which had been stolen. She informed the social worker that she intended to start drug treatment but had not done so

yet. Six days later, the father came to the office and told the social worker someone had stolen all of Mother's clothes. When the social worker asked the father about drug treatment, he said he and Mother would start treatment as soon as they put all of their belongings in storage.

On November 13, 2017, the foster mother informed the social worker that the parents had missed a visit with the children on November 9. The social worker asked Mother why she and the father had missed the visit. Mother explained that they were moving their things to storage and lost track of time. The parents also missed a visit on November 20 and did not request a make-up visit when they were told that the visitation facility would be closed on Thanksgiving Day (Thursday November 23, 2017). The parents attended a scheduled visit on November 27.

The contested jurisdiction/disposition hearing was held on December 5, 2017. Counsel appointed to represent Mother and the father requested a continuance because the parents were not present. The court did not find good cause to continue the matter and denied the request. The court sustained the children's petitions, made true findings on all counts by clear and convincing evidence, declared the children dependents of the court, and ordered them removed from the parents' custody and placed in their licensed foster home. The court ordered the Agency to provide the parents reunification services and supervised visitation.

On May 21, 2018, the Agency filed a status review report for the six-month review hearing. Neither parent was employed and they were still living in a tent in various homeless encampments. Mother started a parenting class in March but her attendance

became inconsistent in May. Both parents admitted they were using methamphetamine and marijuana regularly and had not made any attempts to participate in a drug treatment program. Mother told the social worker that she felt the father was sabotaging their reunification with the children. She complained that the father prevented her from getting to her appointments for the children by purposefully oversleeping, and if she left without him, he would yell at her and make her feel guilty. He also started arguments with her to prevent her from attending her services and he complained that she was choosing the children over him.

Between November 2017 and May 2018, the parents missed numerous scheduled visits with the children and were late to many visits. The children did not show any distress when they left the visits. They had developed a secure attachment to their foster parents and were very happy in that placement.

The social worker concluded there was not a substantial probability that the children would be returned to the parents. Although the parents had made efforts to attend visitation, they had missed more visits than they had attended and were unable to provide a healthy living environment for the children. They were homeless and had been unable to secure housing even though they had been provided the funding and support to do so through the "Bringing Families Home" program. They had no income and continued to use drugs. The parents loved the children and wanted them returned to their care, but despite being provided many opportunities to participate in parenting classes, drug treatment programs, and visitation with the children, they had "been unable to do so

for many different reasons." The Agency recommended the court terminate reunification services and set a section 366.26 hearing.

The Agency filed an addendum report on June 20, 2018, stating that as of June 18, the parents continued to not participate in any drug treatment programs. However, Mother had completed a parenting class. The foster parents were allowing the parents to visit the children on Tuesdays in addition to their Agency-approved visits on Thursdays. The Agency continued to recommend the court terminate reunification services and set a section 366.26 hearing.

At the contested six-month review hearing on June 20, 2018, the court adopted the Agency's recommendations. The court found the parents had not made substantial progress with their case plans and there was not a substantial probability the children would be returned the parents' custody and safely maintained in the home within an extended period of time for reunification services. Accordingly, the court terminated the parents' reunification services and set a section 366.26 hearing.

In its report for the section 366.26 hearing filed in September 2018, the Agency recommended termination of parental rights and adoption as the children's permanent plan. The Agency again noted that the parents had a long history of substance abuse, housing insecurity, and living in unsafe conditions, and that the children were thriving and appeared happy in their foster home, which was their first and only placement.

The Agency assessed the children as specifically adoptable because their foster parents wanted to adopt them. The children were also generally adoptable if the foster parents were unable to adopt them. There were 127 families in San Diego County

approved to adopt a child matching L.B.'s characteristics, 116 families approved to adopt a child matching B.B.'s characteristics, and 82 families approved to adopt a sibling set matching the children's characteristics. By the time of the section 366.26 hearing in January 2019, those numbers had increased to 137, 126, and 91, respectively.

During the period covered by the report, Mother attended eight scheduled supervised visits and the father attended seven of the visits. The parents were late for four of the visits. The children did not show any signs of distress upon parting from the parents. The social worker who wrote the report observed five of the visits. The social worker reported that Mother was appropriate overall during the visits. Mother engaged the children in play and showed her affection with gifts, embraces, and kisses. The social worker did not observe the children refer to Mother as "mommy."

The Agency's assessment was that Mother's relationship with the children did not rise to the level of a parent-child relationship. L.B.'s life was unstable before the dependency proceedings and Mother had not addressed her long history of drug abuse during the proceedings. The fact that Mother had two children older than L.B. and B.B. who were not in her care indicated she continuously had been unable to engage in a parental role. Mother's efforts to visit the children did not indicate a parent-child relationship. She had been late for visits and the children did not ask for her in her absence or show distress while waiting for her to arrive or when they parted from her. Although she was appropriate and showed affection for the children during visits, she did not demonstrate a parental role. Her relationship with the children was that of a friendly visitor whom the children saw for playtime. The children did not rely on Mother for their

daily needs and B.B. had never known her as a parental figure because he had never lived with her. The Agency concluded termination of parental rights would not be detrimental to the children.

A court-appointed special advocate (CASA) for the children appointed on October 31, 2017, filed a report in October 2018 for the section 366.26 hearing. The CASA, who had visited with the children monthly, stated, "I feel that [the children] are in a loving foster home, are well cared for, and that they are happy, healthy, and thriving." The CASA agreed with the Agency that adoption was the best plan for the children.

The court held a contested 366.26 hearing on January 9, 2019, and received in evidence the Agency's report for the hearing, two addendum reports, and the CASA's report. Mother and the father testified at the hearing. After hearing argument from counsel, the court found by clear and convincing evidence that it was likely the children would be adopted and that none of the exceptions set forth in section 366.26, subdivision (c)(1)(B) applied. The court selected adoption as the children's permanent plan, terminated parental rights, and referred the children to the Agency for adoptive placement. The court designated the children's caregivers as the prospective adoptive parents.

DISCUSSION

Mother contends the court erred in finding that the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i), did not apply to preclude the termination of her parental rights. " 'At a permanency plan hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster

care. [Citation.] If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans.' [Citation.] 'Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." ' " (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1165 (*G.B.*.)

This court has interpreted "the 'benefit from continuing the [parent[-]child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*.)

"A parent asserting the parental benefit exception has the burden of establishing that exception by a preponderance of the evidence. [Citation.] It is not enough to show that the parent and child have a friendly and loving relationship. [Citation.] ' "Interaction between [a] natural parent and child will always confer some incidental benefit to the

child" ' [Citation.] For the exception to apply, 'a *parental* relationship is necessary[.]' [Citation.] ' "While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent." ' " (*In re J.C.* (2014) 226 Cal.App.4th 503, 529 (*J.C.*.)

Appellate courts have applied different standards of review to the parent-child beneficial relationship exception. (See *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) Most courts initially applied the substantial evidence standard. (See *ibid.*; *J.C.*, *supra*, 226 Cal.App.4th at p. 530.) However, this court has applied a "hybrid standard," under which "[w]e apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395.) We will apply the hybrid standard.³

We conclude Mother has not met her burden of establishing the beneficial parent-child relationship exception to adoption. At the section 366.26 hearing, the court acknowledged that both parents "love [the children] very much[.]" and that they had been

³ As a practical matter, the analysis is essentially the same under either standard of review. As noted above, " 'evaluating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only " 'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order [under review].' . . . " ' " (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

consistent in their visitation and had engaged appropriately with the children. However, the court also noted that Mother had two other children that were dependents and that she and the father were offered reunification services at the jurisdiction/disposition hearing, but "unfortunately, the parents didn't engage in the reunification services that would have likely expanded their time with the children and allow them to be in a different place today." The court observed that "because [the parents] have not been able to address the underlying issues in this case, substance abuse and unstable living situation, they've not been able to progress beyond a supervised [visitation] setting. So they really haven't participated in the appointments and the care that was necessary and that was provided by the caregivers in terms of addressing [L.B.'s] speech issues and the motor skills issues and the things that are being addressed right now." The court concluded the evidence did not show a parent-child relationship between the parents and the children, and that even if it did, "the benefits that these children would receive from having a stable, forever, permanent home are not outweighed by that relationship."

The court's conclusion that the evidence did not show a parent-child relationship between Mother and the children was reasonable. The evidence showed that Mother and the father had a long history of substance abuse, homelessness, and living in unsafe conditions, and that they failed to secure safe housing or participate in any drug treatment programs throughout the dependency proceedings. Thus, at the time of the section 366.26 hearing, Mother had still not adequately addressed the issues that gave rise to the children's dependency. The Agency reported that the children did not rely on Mother for their daily needs and B.B. had never known Mother as a parental figure because he had

never lived with her. The children relied on their foster parents for their daily needs and were thriving and happy in their foster home—their only placement since the beginning of the dependency case. They separated easily from Mother at the end of visits with no distress. The Agency concluded that Mother's relationship with the children did not rise to the level of a parent-child relationship, and that the dependency proceedings for the children's two older half-siblings showed that Mother continuously had been unable to act in a parental role. Based on the evidence, the court reasonably found that there was not a parent-child relationship between Mother and the children that would outweigh the benefits the children would receive from having, in the court's words, "a stable, forever, permanent home"

Mother's argument that the court should have applied the beneficial parental relationship exception is based entirely on the quality of her supervised visitation with the children. Although Mother's visitation with the children was generally positive and reflected a close relationship between them, visitation is only part of the total picture the court must consider. Even where the juvenile court finds the existence of a positive relationship between a parent and child, to apply the beneficial relationship exception the court must also find that termination of parental rights would be *detrimental* to the child. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; *G.B.*, *supra*, 227 Cal.App.4th at p. 1165.) In other words, the evidence must support a finding that "severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that *the child would be greatly harmed*" (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, italics added.) Mother argues the children would benefit from

continuing a parent-child relationship with her, but she does not cite any evidence in the record that severance of the relationship would greatly harm the children. Thus, the court did not abuse its discretion in determining Mother did not have a beneficial parent-child relationship with the children within the meaning of section 366.26, subdivision (c)(1)(B)(i) that precluded the termination of parental rights.

DISPOSITION

The orders terminating parental rights and selecting adoption as the permanent plan for the children are affirmed.

BENKE, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.